## HO YORK QUIN of CHOP TECK CHONG PAWNSHOP v. R.

[A. Cr. J. (Sir Charles Murray-Aynsley, C.J.)
November 27, 1952]

[Singapore — Magistrate's Appeal No. 175 of 1951]

*Pawnbrokers Ordinance (Cap. 216) s. 27 — Restitution of property — Discretion of Magistrate in making order or not.*

This appeal arose out of an order made under section 27 of the Pawnbrokers Ordinance. The accused had been convicted under section 420 of the Penal Code for cheating in respect of a watch belonging to one Ong Loi Chan. The watch had been pawned by the accused with Chop Teck Chong Pawnshop, of which the appellant was the managing Partner. After the conviction of the accused, the learned Magistrate held he had no discretion but to order the return of the watch to the complainant, Ong Lai Chan.

Held: (1) the Court has the fullest discretion as to whether to make an order or not and in the order it makes if it should decide to make one; (2) it is a safe rule that in cases of doubt or difficulty an order should not be made.

[Editorial Note: In Sem Hin Pawnshop v. R. (1952) M.L.J. 164 Brown, J. held that where ownership having been proved, by common law the owner would be entitled to the articles unconditionally, however careless he had been. In a case where the conduct of both parties is free from criticism in no circumstances would the Court order the owner to pay a part of the loan; and the innocent pawnbroker must suffer for having taken a risk which is inseparable from his trade.]

*Cases referred to:—*

(1) *R. v. Nadaison* (1935) M.L.J. 148.

(2) *Leicester v. Cherryman* (1907) 2 K.B. 101.

MAGISTRATE'S APPEAL.

*T. W. Ong* for the appellant.

*A. V. Winslow* (Crown Counsel) for the Crown.

*Cur. Adv. Vult.*

**Sir Charles Murray-Aynsley, C.J.** : — This appeal arose out of an order made under section 27 of Pawnbrokers Ordinance (Cap. 216). The learned Magistrate considered he had no discretion in the matter and did not exercise his discretion. I exercised it for him.

This section follows the English Pawnbrokers Act of 1862. All that need be said is that the Court has the fullest discretion as to whether to make an order or not and in the order it makes if it should decide to make one. The matter was reviewed by Huggard, C.J., in the local case of *Nadaison*[1]. I only mention the matter because I think that case might prove misleading.

In the first place it should be noted that an order made under the Ordinance does not affect rights of property. It merely gives power to give possession. Whatever the order the Court makes, the owner can assert his legal rights (see *Leicester v. Cherryman*[2]).

The Court may make its order as "according to the conduct of the owner and the other circumstances of the case, seems just and fitting." The "other circumstances of the case" means in most cases the conduct of persons other than the owner.

As regards conduct, I think it can be said definitely that if the person seeking the order has been guilty of dishonesty, an order should not be made. In this respect I think the order made in the case reported, so far as it related to the property of *Nadaison*, is wrong. If in that case the defrauded pawnbroker had kept the goods, he could have counterclaimed with success if the thief had taken proceedings to recover them. In the cases where orders are made the conduct of the parties means therefore, in practice, negligence.

The common law is very tender to true owners whether negligent or not. Courts should not, in my opinion, make orders under this section except on terms where the true owner has failed to take reasonable care of his property.

It should be noted that the section merely gives power to order delivery. It does not confer power to give a judgment for a sum of money when the pawnbroker no longer has the property, as was done by Huggard, C.J., in the case referred to.

It is a safe rule that in cases of doubt or difficulty an order should not be made.

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## R. v. ANG ENG KEAT.

[Cr. R. J. (Spenser Wilkinson, J.) November 13, 1952]

[Penang — Criminal Revision No. 18 of 1952]

*Customs Enactment, 1936, s. 108 — Forfeiture at conclusion of trial as part of punishment and on a separate application distinguished.*

The accused was convicted of attempting to export motor tyres in contravention of the Prohibition of Export Order, 1949. The Magistrate refused the application of the prosecution for an order of forfeiture. Subsequently a separate application was made under section 108 of the Customs Enactment. The Magistrate again refused to make an order for forfeiture.

Held: under section 108(iv) of the Enactment, unless the claimant can prove that he is the owner and that the goods are not liable to forfeiture, it is the duty of the Court to carry out the machinery provided by section 108 by ordering a forfeiture.

*Cases referred to:—*

(1) *Tan Kee Guan v. Rex* (1949) M.L.J. 216.

(2) *De Keyser v. British Rly.* etc. (1936) 1 K.B. 224.

CRIMINAL REVISION.

*C. M. Sheridan* for the Crown.

*C. O. Lim* for the respondent.

**Spenser Wilkinson, J.** : — In this case the accused was charged with attempting to export 42 motor tyres in contravention of the Prohibition of Exports Order, 1949. He pleaded guilty and was duly convicted on his plea and was fined $3,000 or 4 months' rigorous imprisonment in default. On an application at the conclusion of the trial by the prosecution for an order of forfeiture of the tyres the learned Magistrate refused to make an order following the ruling in the case of *Tan Kee Guan v. Rex*[1].

Subsequently the accused made application under section 108 of the Customs Enactment claiming the goods and, the matter having been referred to the Court by the Customs authorities under sub-section (iv) of section 108 the Magistrate issued a Summons under sub-section (v) of the same section.

In the course of the argument before him on the hearing of the Summons Counsel for the applicant admitted that the goods were liable to forfeiture. In spite of this, however, the learned Magistrate, still following the principle laid down in *Tan Kee Guan v. Rex*[1], refused to make an order for forfeiture. This decision of the Magistrate came before me by way of review.

It was argued on behalf of the Crown that the case of *De Keyser v. British Railway Traffic & Electric Co. Ltd.*[2] indicated that the duty of the Magistrate in the circumstances was to order forfeiture in spite of the fact that the English Customs law upon which that case was decided differs from the local law in one important respect. The question in that case was in regard to a conveyance in which uncustomed goods had been conveyed and under section 202 of the Act any such conveyance "shall be forfeited", and the judgments in *De Keyser's case*[2] to a great extent depend upon the interpretation of section 202 combined with section 226, which is very similar to sub-section (v) of our section 108.

I agree with the submission of the Deputy Public Prosecutor that the difference between the English Act and our Enactment is not so great as at first sight it appears to be. Our section 106 merely says that all goods liable to seizure under the Enactment "shall be liable to forfeiture", but then sub-section (ii) of section 108 provides that if goods seized be not forfeited by order of the Court before which the prosecution is had, or if there be no prosecution the goods shall be "taken and deemed to be forfeited" at the expiration of one calendar month from the date of seizure unless a claim thereto has been made before that date. In other words the goods "shall be forfeited" unless a claim is made. Under sub-section (iv) a claimant has to assert not only that he is the owner but also that the goods are not liable to forfeiture. I think the inference is irresistible that unless the claimant's claim is successful on both points the result must be forfeiture. I have no doubt, therefore, that the position under sub-section (v) of section 108 of the Customs Enactment is virtually the same as the position under section 226 of the English Act. Put in another way, it is clear that the word "may" where it first appears in sub-section (v) means "must", and the same interpretation should be given to the second word "may" in the same sub-section.

I think the learned Magistrate allowed himself to become a little confused between the position when the matter was before him at the conclusion of the trial when forfeiture, if ordered, would have been part of the punishment, and the position when the matter was before him again on an application under section 108 when the only matters into which he had to inquire were whether the applicant was the owner of the goods and whether they were liable to forfeiture. If *De Keyser's case*[2] had been cited to him his decision would probably have been different. On the second occasion, once he was satisfied that the goods were liable to forfeiture, his duty was to carry out the machinery provided by section 108 by ordering a forfeiture.

Mr. C. O. Lim, who appeared on behalf of the owner, agreed with the proposition of law put forward by the Deputy Public Prosecutor. I therefore varied the order of the learned Magistrate and substituted an order that the goods in question be forfeited.

*Order accordingly.*

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## LEE TENG TAI v. PUBLIC PROSECUTOR.

**[C. A. (Mathew, C.J. (F.M.), Sir Charles Murray-Aynsley, C.J. (Singapore) and Whitton, J.) November 14, 1952]**

**[K.L. — Federation Criminal Appeal No. 77 of 1952]**

*Emergency Regulations, 1948, regulation 4(1)(b) — Possession of ammunition — Alleged possession in 5 different places contained in one charge — Whether irregular — Corroboration — Burden of proof.*

This appeal raises, inter alia, one important point, namely, whether the charge which alleged possession of a handgrenade at 5 different places over a period exceeding 12 months was bad.

**Held:** (Sir Charles Murray-Aynsley, C.J. dissenting): Possession is of its nature continuous, and so long as the appellant continued to be in possession, the offence was continuing. It was open to the prosecution to charge a continuous act of possession over a period of time. The particulars of the places where possession would be proved could well have been omitted from the charge, but since the charge alleged one continuous offence there is no irregularity.

Per Sir Charles Murray-Aynsley, C.J.: If the words of the charge are to be given their natural meaning, five